No. 77-631

In the Supreme Court of the United States

OCTOBER TERM, 1977

DOUGLAS M. COSTLE, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, and GEORGE R. ALEXANDER, JR., REGIONAL ADMINISTRATOR, PETITIONERS

v.

REPUBLIC STEEL CORPORATION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of Douglas M. Costle, Administrator of the Environmental Protection Agency, and George R. Alexander, Jr., Regional Administrator, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-16a) is reported at 557 F.2d 91. The de-

cision of the Environmental Protection Agency (App. C, *infra*, pp. 19a-23a) is not reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, pp. 17a-18a) was entered on June 23, 1977. On September 12, 1977, Mr. Justice Stewart extended the time within which to file a petition for a writ of certiorari to and including October 21, 1977, and on October 12, 1977, he further extended the time to and including October 31, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the inability of the Environmental Protection Agency to promulgate guidelines establishing on a nationwide basis the best practicable water pollution control technology excuses dischargers from meeting the statutory deadline of July 1, 1977, to achieve the best practicable technology that has been established for them specifically in individual permits.

STATUTES INVOLVED

The pertinent portions of Sections 301, 304 and 402 of the Federal Water Pollution Control Act Amendments of 1972 are set out in App. D, *infra*, pp. 24a-31a.

STATEMENT

1. The Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, 33 U.S.C. (Supp.

V) 1251 *et seq.*, establish the "national goal that the discharge of pollutants into the navigable waters be eliminated by 1985" (33 U.S.C. (Supp. V) 1251(a)(1)). Congress sought to move toward that goal in several stages. By July 1, 1977, polluters must achieve levels of discharge consistent with "the best practicable control technology currently available" (Section 301(b)(1)(A)), and by 1983 they must reach levels consistent with "the best available technology economically achievable" (Section 301(b)(2)(A)). See also *Environmental Protection Agency* v. *California*, 426 U.S. 200, 204 n. 11; *E. I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 121. The accomplishment of these successive levels of pollution control is supervised by a system of permits for individual sources of pollution.

The permit system is established by Section 402 of the statute. No person may discharge any pollutant after December 31, 1974, without a permit (Sections 301(a) and 402(k)), and no permit may be issued that does not require the achievement of levels of effluent consistent with the best practicable control technology by July 1, 1977 (Section 402(a)(1) and (b)(1)(A)). The permits may be issued by the Administrator of the Environmental Protection Agency or by States that have instituted permit programs approved by the Agency (Section 402(b)). The Administrator may disapprove State-issued permits that are "outside the guidelines and requirements" of the statute (Section 402(d)(2)). And the Administrator may require federal permits to contain,

"prior to the taking of necessary implementing actions relating to all [the statutory] requirements, such conditions as the Administrator determines are necessary to carry out the provisions" of the statute (Section 402(a)(1)).

Because terms such as "best practicable technology" are not self-defining, Congress required the Administrator to promulgate nationwide "regulations, providing guidelines for effluent limitations," for each industry by October 18, 1973, specifying the "[f]actors relating to the assessment of best practicable control technology currently available" (Section 304(b)(1)(B)). These guidelines would assist federal and state officials in formulating conditions in individual permits.

But "[t]he various deadlines imposed on the Administrator were too ambitious for him to meet." *du Pont*, *supra*, 430 U.S. at 122. The Administrator was unable to promulgate guidelines for the hundreds of industries within the time fixed by Congress. See generally *Natural Resources Defense Council, Inc.* v. *Train*, 510 F.2d 692 (C.A. D.C.). The Administrator did not promulgate guidelines for primary operations in the carbon steel industry until June 28, 1974 (39 Fed. Reg. 24114), and a court of appeals held that these guidelines were defective in part. *American Iron and Steel Institute* v. *Environmental Protection Agency*, 526 F.2d 1027 (C.A. 3).[1]

[1] On August 10, 1977, the court of appeals recalled its mandate in part, concluding that its invalidation of the form of the regulations was erroneous in light of this Court's subsequent decision in *du Pont*. *American Iron and Steel Institute* v. *Environmental Protection Agency*, C.A. 3, No. 74-1640.

The Agency published interim final regulations for alloy and stainless steel operations only on March 29, 1976 (41 Fed. Reg. 12990); these have been sustained in substantial measure, although they were remanded for lack of sufficient notice. *American Iron and Steel Institute* v. *Environmental Protection Agency*, C.A. 3, No. 76-1386, decided September 14, 1977.

2. In July 1972 respondent Republic Steel Corp. applied for a permit to discharge pollutants into navigable waters from its mill in Canton, Ohio. This application was pending in March 1974 when the Environmental Protection Agency approved Ohio's permit program; the Agency consequently transferred Republic's application to the Ohio Environmental Protection Agency (App. A, *infra*, p. 4a).

Ohio issued a draft permit to Republic on June 10, 1974 (App. A, *infra*, p. 5a). This permit contained Ohio's assessment of the amounts of discharge consistent with the best practicable control technology, and it required compliance by June 1976 (*ibid.*).[2] Republic, seeking more favorable terms, initiated administrative proceedings provided for by state law

[2] This permit appears at A. 1a-20a. ("A." designates the appendix in the court of appeals. A copy of that appendix has been lodged with the Clerk of this Court.) Although this permit might have required technology more effective than the federal statute contemplates, it could not, under Section 402 of the statute, have required less effective technology. Ohio has not stated whether it views the permit as requiring more than the federal minimum.

(*ibid.*). On August 1, 1975, Republic and Ohio agreed on discharge levels less stringent than those established by the June 1974 permit.[3] After additional administrative proceedings, Ohio established a compliance schedule giving Republic until February 1, 1979 (42 months from August 1, 1975) within which to achieve the level of control required by the permit (App. A, *infra*, p. 6a).

In January 1976 Ohio transmitted this permit to the Agency for approval. The Agency objected on March 30, 1976 (App. C, *infra*, pp. 19a-23a). Although the Agency did not take issue with the State's standard for effluent limitations that would be consistent with the best practicable control technology, it concluded that the February 1, 1979, deadline set by the permit for compliance did not meet the July 1, 1977, deadline established by the federal statute.

3. Republic filed a petition for review of the Agency's decision to object to the permit. The court of appeals concluded that the issuance of guidelines defining the best practicable control technology in each industry is a condition precedent to the applicability of the July 1, 1977, deadline specified in Section 301(b)(1)(A) of the statute.

The court acknowledged that the statutory deadline is inflexible on its face and that the "legislative history is replete with statements attesting to the inflexible nature of the administrative timetable" (App. A, *infra*, pp. 10a-11a). Nevertheless, the court

[3] See A. 21a-39a, 43a, 44a.

thought, Congress had not contemplated that compliance with effluent limitations would precede issuance of nationwide guidelines. It thus held "that section 301(b)(1)(A)(i) is made unenforceable by the Administrator's failure to promulgate necessary regulations * * * [and] that the July 1, 1977, deadline is no longer an 'applicable requirement' of the Act" (*id.* at 14a). Because the Administrator may disapprove state-issued permits only for failure to comply with an "applicable requirement" of the statute, the Administrator was not authorized to disapprove the permit issued to Republic.

The court considered the Agency's argument that its authority under Section 402(a)(1) to impose conditions on permits prior to the promulgation of guidelines demonstrated the propriety of case-by-case determination of the best practicable technology. The court apparently concluded, however, that the Agency's authority to impose conditions under this section had lapsed in 1973, when it should have issued the guidelines (App. A, *infra*, pp. 11a-12a).[4]

The court purported to restrict its holding to permits finally issued after December 31, 1974. It reasoned that, with respect to plants covered by earlier permits, the dischargers have had adequate time to

[4] The court of appeals stated that the authority was "a *temporary* expedient to ensure immediate progress during the year of rule making contemplated by section 402(b)" (App. A, *infra*, p. 12a; emphasis in original). But Section 402(b) does not provide for or contemplate rulemaking of any sort. We assume that the court meant to refer to the rulemaking contemplated by Section 304(b).

comply with the July 1, 1977, deadline (App. A, *infra*, pp. 12a-14a and n. 18). Consistent with this equity-like approach to the problem, the court of appeals remanded the case to the Agency for further proceedings to scrutinize "the inherent reasonableness of the proposed 42 month period" for compliance if the Agency could find some other ground for withholding approval (*id.* at 15a-16a).

ARGUMENT

1. The Federal Water Pollution Control Act Amendments of 1972 establish a program for achieving in stages the goal of no water pollution by 1985. The first major stage—limitation of effluents to those consistent with "the best practicable control technology"—was to be achieved by July 1, 1977 (Section 301(b)(1)(A)). The court of appeals in the present case has eviscerated the statute by holding that "the July 1, 1977, deadline is no longer an 'applicable requirement' of the Act" (App. A, *infra*, p. 14a)—that it is no longer a requirement to which the Environmental Protection Agency may compel adherence in the many industries for which the Agency has been unable to promulgate nationwide guidelines.

The court of appeals stated that its decision would not necessarily apply to cases in which final permits had been issued on or before December 31, 1974 (App. A, *infra*, pp. 12a-14a and n. 18). But this restriction, which appears to be based on an incorrect belief that December 31, 1974, was the last date for

issuance of permits,[5] is untenable. If, as the court of appeals stated, the July 1, 1977, deadline is not an "applicable requirement" of the statute, it cannot be enforced at all. It is no longer one of the "applicable requirements" upon which federal discharge permits must be conditioned by the terms of Section 402(a)(1), or State discharge permits by the terms of Section 402(b)(1)(A).

Moreover, the distinction between post-1974 permits and earlier ones overlooks the reality that the date of permit issuance is largely dependent on the actions of the discharger; Republic received a draft permit in June 1974, and this would have become final before December 31, 1974, if Republic had not requested a delay. Since any efforts by dischargers to obtain more favorable treatment are "carried out

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[5] See App. A, *infra*, pp. 4a and n.6, 6a n.10, 13a. Nothing in the Act, however, sets any final date for the issuance of permits. December 31, 1974, is a deadline only from the point of view of polluters. Section 301 provides that no discharge is lawful in the absence of a permit authorizing that discharge, and Section 402(k) suspends the permit requirement until December 31, 1974. As a practical consequence, therefore, a polluter must secure a permit by December 31, 1974, or its continued operations violate the statute. But this statutory pressure placed on dischargers to obtain permits does not mean that subsequently issued permits are any less valid, or are to be assessed by any different standards, than permits issued before December 31, 1974. The Senate bill had contained a deadline for permit issuance; this deadline was deleted from the bill prior to passage. See A Legislative History of the Water Pollution Control Act Amendments of 1972, 93d Cong., 1st Sess. 1462, 1691 (Comm. Print 1973) ("Leg. Hist.").

on the polluter's time, not the public's" (*Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 92), Republic is not entitled to preferred treatment as a result of administrative proceedings carried out at its behest that postponed the final issuance of the permit. A discharger that accepted its permit in 1974 would have a stronger claim than Republic to the dispensation granted by the court of appeals. For this reason, too, the court's decision inevitably calls into question the enforceability of the July 1, 1977, deadline for all permits.

But even if the court's assessment of the scope of its holding were correct, the decision still would have widespread consequences. The Environmental Protection Agency calculates that since December 31, 1974, it and the authorized States have issued more than 1100 permits to major polluters.[6] Approximately 472 of these permits were issued in industries not covered by national best-practicable-technology guidelines. More than 50 of these approximately 472 permits were issued to dischargers within the jurisdiction of the Sixth Circuit, and these dischargers undoubtedly will contend that it is unfair to enforce the July 1, 1977, deadline against them but not against Republic.[7] The disposition of this case

[6] A "major" polluter is one discharging more than 50,000 gallons of contaminants per day or one whose discharges affect the waters of more than one State. 40 C.F.R. 125.1(m).

[7] If one includes permits issued before December 31, 1974, approximately 312 permits have been issued to major polluters within the States in the Sixth Circuit.

therefore will have a substantial effect on the Agency's ability to carry out its statutory task.

2. The decision of the court of appeals has created a conflict among the circuits. *Bethlehem Steel Corp.* v. *Train*, 544 F.2d 657 (C.A. 3), certiorari denied *sub nom. Bethlehem Steel Corp.* v. *Quarles*, 430 U.S. 975,[8] and *United States Steel Corp.* v. *Train*, 556 F.2d 822, 853-855 (C.A. 7), both held that the failure of the Administrator to promulgate national guidelines does not affect the enforceability of the July 1, 1977, deadline. Both courts concluded that the Administrator has ample authority to determine the best practicable technology plant-by-plant in the absence of national guidelines; both held that the deadline for compliance is inflexible, and that any contentions that enforcement would be unfair should be addressed to Congress.

The court of appeals in the present case distinguished *Bethlehem Steel* on the ground that Bethlehem received its final permit on December 31, 1974 (see App. A, *infra*, pp. 12a-14a). This distinction is untenable for the reasons we have discussed. In any event, it is unavailable with respect to the *United States Steel Corp.* case. The permit initially issued to United States Steel in 1974, like that issued to Republic in 1974, was subject to further administrative consideration. The final permit did not issue to United States Steel until June 25, 1976, almost a year after

[8] The Chief Justice and Mr. Justice Powell noted that they voted to grant certiorari.

Ohio and Republic agreed on the terms of a final permit. The Seventh Circuit nevertheless concluded that the July 1, 1977, compliance date was firm, and it held that delay in final permit issuance does not extend the date for final compliance (556 F.2d at 847). The conflict among the circuits on this question therefore is firmly established, and this Court should resolve that conflict.[9]

3. The court of appeals based its decision on the fact that Section 301(b)(1)(A), which establishes the July 1, 1977, deadline, also refers to the guidelines that Congress wanted the Administrator to promulgate.[10] The court reasoned that polluters could

[9] The decision of the court of appeals also conflicts in principle with the decisions of two other courts. In *State Water Control Board* v. *Train*, 559 F.2d 921 (C.A. 4), the court of appeals held that the availability of federal funding for sewage treatment plants (funding that had been unlawfully withheld by the Environmental Protection Agency) is not a condition precedent to requiring municipalities to meet the July 1, 1977, deadline. The court held that the Agency's failure to perform statutory duties does not extend the time for compliance. In *Natural Resources Defense Council, Inc.* v. *Train*, *supra*, 510 F.2d at 710-711, the court of appeals invited the Agency to pretermit publication of nationwide guidelines for certain categories of sources and to determine the best practicable technology plant-by-plant. This invitation must have rested on the court's belief that plant-by-plant definition would be lawful and that the July 1, 1977, deadline still could be enforced.

[10] Section 301(b)(1)(A) provides that there shall be achieved "not later than July 1, 1977, effluent limitations for point sources * * * (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to" Section 304(b).

not be required to comply with guidelines before they had been issued (App. A, *infra*, p. 8a).

The court of appeals erred because it misunderstood the role of the guidelines in the statutory plan. The statute does not require compliance with the guidelines by July 1, 1977, or any other date. The statute requires that polluters achieve by that date a level of discharges consistent with the application of the best practicable technology. The guidelines assist in implementing the statutory requirement, but the requirement itself—achievement of the best practicable technology—exists independently of the guidelines. For that reason Congress provided in Section 402(a)(1) that the Agency could specify the conditions of permits case-by-case prior to the promulgation of guidelines.[11] Similarly, in the absence of na-

[11] The court of appeals apparently concluded (App. A, *infra*, pp. 11a-12a; see also note 4, *supra*) that the Administrator's authority under Section 402(a) to set conditions plant-by-plant expired in October 1973, when the guidelines should have been issued. But this gives the statute a meaning Congress could not have intended. The statutory timetable contemplates that guidelines ordinarily would be established before permits were issued to dischargers. If the court of appeals were correct, Section 402(a) would authorize the inclusion of conditions in permits only during the period before guidelines were issued and hence before permits were to be issued—which would yield a meaningless statute. We believe that Congress should be taken at its word: Section 402(a)(1), which authorizes the Administrator to set conditions plant-by-plant "prior to the taking of necessary implementing actions," should be interpreted to apply to all permits issued before the guidelines were in fact promulgated and not just to permits issued before the guidelines should have been promulgated.

tional guidelines, States (subject to review by the Administrator) must ascertain the best practicable technology plant-by-plant.[12]

It simply does not follow that, because Congress wanted guidelines to be issued, it was willing to tolerate postponement of the first level of significant effluent control if the Agency should be unable to issue the guidelines. Dischargers have known since 1972 of the statutory requirement to achieve the best practicable technology by 1977. Each permit gives the discharger ample guidance concerning the requirements it must meet. Although national guidelines would have been of great assistance to Ohio in drafting the requirements of Republic's permit, they were not essential for that task. The effluent levels representing the best practicable technology for Republic's plant have been established in the permit in a

[12] The court of appeals suggested that the Administrator might have been entitled to require compliance with the July 1, 1977, deadline if the federal Agency, rather than Ohio, had issued the permit (App. A, *infra*, pp. 13a-14a). But there is no difference between state and federal permits that would permit enforcement of the July 1, 1977, deadline only in the case of federal permits. Federal permits, like state permits, must require the discharger to meet "all applicable requirements" of the Act (Section 402(a)(1)), and the court of appeals has held that the July 1, 1977, deadline is not an "applicable requirement" (App. A, *infra*, p. 14a). The statute contemplates that both state and federal permit systems shall "be subject to the same terms, conditions, and requirements" (Section 402(a)(3)). It is therefore difficult to see how the deadline contained in federal permits may be sustained if the Administrator may not require the July 1, 1977, deadline to be observed in state-issued permits.

way that is satisfactory to Ohio, to Republic, and to the Administrator. There is thus no question here about what must be achieved; the question is when this known degree of control must be achieved. The presence or absence of the guidelines, which go to "what" rather than "when," should not control the timing of compliance.

4. As the court of appeals acknowledged (App. A, *infra*, pp. 10a-11a), the legislative history of the statute supports our position that Congress intended the July 1, 1977, deadline to be inflexible. Many members of Congress stated that the July 1, 1977, deadline was a firm requirement to be met regardless of other considerations.[13] The House bill had permitted relaxation of the deadline in certain circumstances; this provision was deleted by the Conference Committee, confirming that the deadline was intended to be inflexible.[14] Nothing in the legislative history indicates that the statutory deadline, inflexible on its face, could be defeated by the difficulty in promulgating nationwide guidelines that are not necessary to inform the polluter what is required of him.

5. The decision of the court of appeals appears to rest ultimately on the court's belief that equitable principles require every polluter to have at least 30 months (the time between December 31, 1974, and July 1, 1977) within which to achieve the best prac-

[13] See Leg. Hist., *supra* n. 5, at 162, 231, 1278.

[14] See Leg. Hist., *supra* n. 5, at 965. See also App. A, *infra*, p. 11a.

ticable pollution control technology after the requirements of that technology have been definitively established (see App. A, *infra*, pp. 6a and n. 10, 7a, 12a-13a, 15a-16a). But the statutory timetables were deliberately made rigid because Congress recognized that "[m]en seldom draw [their] best from themselves unless pressed by circumstances and deadlines. This bill contains deadlines and it imposes rather tough standards * * *. Only under such conditions are we likely * * * to meet the objectives stated in our bill." [15] An essentially "equitable" approach to statutory construction is unwarranted where, as here, the statute was intended to be unyielding. See *Union Electric Co.* v. *Environmental Protection Agency*, 427 U.S. 246, 269. In any event, the court of appeals' belief that Congress intended polluters to have at least 30 months to install the best practicable technology after it was definitively defined is simply incorrect. The July 1, 1977, deadline is the *last* date for compliance and not, as the court of appeals supposed, the first.[16]

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[15] See Leg. Hist., *supra* n. 5, at 1278 (statement of Senator Montoya).

[16] Section 301(b) authorizes the Administrator to require implementation of the best practicable pollution control technology "not later than July 1, 1977"; the Administrator thus can impose, and has imposed, earlier dates in permits granted by the Agency pursuant to Section 402(a)(1). The 30-month period between December 31, 1974, and July 1, 1977, therefore is the maximum time allowed by the statute for compliance and not, as the court of appeals assumed, a minimum period deemed necessary by Congress to ensure fairness.

We do not contend that polluters making good faith efforts to install the best practicable technology must cease doing business if, for reasons beyond their control, they are unable to meet the congressional deadline. The Administrator has discretion not to bring an enforcement action when he determines that the polluter is doing its best to comply with the statute.[17] Moreover, Congress could provide relief if it should determine that compliance by July 1, 1977, is infeasible or undesirable. But Congress, with full knowledge of the Administrator's inability to meet the timetable for the promulgation of guidelines, has not disturbed the July 1, 1977 deadline. Pending legislation would allow discretionary exceptions to that timetable, but the deadline itself would remain.[18]

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[17] The Agency has established a formal procedure called the Enforcement Compliance Schedule Letter (ECSL) by which dischargers may obtain assurance that the Agency will not enforce the July 1, 1977, deadline under certain conditions. See *Bethlehem Steel Corp.* v. *Train, supra.*

[18] On August 4, 1977, the Senate passed S. 1952, 95th Cong., 1st Sess. (1977), which would add to the statute a new Section 309(a)(5) allowing the Administrator to extend the compliance deadline under carefully delineated conditions. This bill, which has provisions essentially identical to the Agency's ECSL program, has been sent to a conference committee together with H.R. 3199, 95th Cong., 1st Sess. (1977), which, as passed by the House in April 1977, would add a new Section 301(g), authorizing the Administrator to extend the July 1, 1977, deadline for as long as two years in certain cases. Both bills retain the July 1, 1977, deadline as the ordinary compliance date. The Senate Committee stated that "[u]nder existing law there are no circumstances that justify a time for compliance extending beyond July 1, 1977. * * * Thus, the decision of the U.S. Court of Appeals for the Sixth Circuit

We submit that administrative and legislative remedies are the appropriate cure for any inequities that may flow from the statutory deadline. Republic is not entitled to be excused altogether from compliance with the congressional command. The deadline, which is the centerpiece of the statutory program, should not be obliterated by the courts.

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in *Republic Steel Corporation* v. *Train* et al. and Williams, —— F.2d ——, (6th Cir. 1977) was an incorrect interpretation of existing law" (S. Rep. No. 95-370, 95th Cong., 1st Sess. 60 (1977)).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1977.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 76-1557

REPUBLIC STEEL CORPORATION, PETITIONER,

v.

RUSSELL E. TRAIN, Administrator, United States Environmental Protection Agency,

GEORGE R. ALEXANDER, JR., Regional Administrator, United States Environmental Protection Agency,

and

NED E. WILLIAMS, Director, Ohio Environmental Protection Agency, RESPONDENTS.

PETITION to review action of the Administrator of the United States Environmental Protection Agency.

Decided and Filed June 23, 1977.

Before: CELEBREZZE and LIVELY, Circuit Judges, and RUBIN,* District Judge.

CELEBREZZE, Circuit Judge. This case of first impression arises under the 1972 amendments to the Federal Water Pollution Control Act, P.L. 92-500.[1] The question presented is whether failure of the Administrator of the United States Environmental Protection Agency (EPA) to define interim effluent limitations reflecting a given level of pollution control technology, as required by the Act, frees an authorized state agency to issue a discharge permit which sanctions noncompliance with the statutory deadline for achieving that degree of effluent abatement.

The law in the case consists of three interdependent provisions of the Act which are at the crux of the regulatory scheme to control point sources of water pollution. Section 301(b)[2] defines an inflexible schedule for achieving two interim levels of effluent abatement in furtherance of "the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985." Section 101(a)(1). Key to this litigation is the subsection 301(b)(1)(A)(i) requirement of conformity by July 1, 1977 with "effluent limitations for point sources * * * which shall require the application of the best practicable control

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* The Honorable Carl B. Rubin, Judge, United States District Court for the Southern District of Ohio, sitting by designation.

[1] 33 U.S.C. § 1251 *et seq.* (Supp. III 1973).

[2] 33 U.S.C. § 1311(b).

technology currently available [BPT] as defined by the Administrator pursuant to section [304(b)] of [the Act] * * *." Section 304(b)(1),[3] in turn, obligates the Administrator to publish by October 18, 1973, regulations establishing effluent guidelines reflecting BPT for categories of dischargers including iron and steel manufacturing. See section 306(b)(1)(A).[4]

Pollution control standards promulgated pursuant to sections 301 and 304 are implemented nationally through a decentralized permit granting mechanism defined in section 402[5] as the National Pollutant Discharge Elimination System (NPDES). Subsection 402(a)(1) empowers EPA in the normal course to issue permits which impose industry-wide effluent limitations which it has already defined. In addition, EPA may define these limitations on a case by case basis "prior to the taking of necessary implementing actions relating to all such requirements" (i.e., while rule making is still in progress). *Id.*

Subsection 402(b) directs the Administrator to delegate permit granting authority to states which have proposed self-regulatory programs which are operationally compatible with uniform administration of the Act. To ensure that qualifying state environ-

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[3] 33 U.S.C. § 1314(b)(1).

[4] 33 U.S.C. § 1316(b)(1)(A) lists the minimum industry categories of pollution sources for which regulations must be promulgated.

[5] 33 U.S.C. § 1342.

mental agencies apply effluent limitations even-handedly, subsection 402(d)(2)(B) empowers the Administrator to block issuance of any proposed NPDES permit which he deems to be "outside the guidelines and requirements of [the Act]." *Id.* Whether federal or state in origin, all NPDES permits must ensure compliance with "applicable requirements" of six enumerated provisions of the Act including section 301. In addition, all permits must issue on or before December 31, 1974, pursuant to subsection 402(k).[4]

In July, 1972, Republic Steel Corporation (Republic) applied for a federal permit to continue discharging effluents from its Canton, Ohio steel mill into Nimishillen Creek. The Canton mill is an integrated steel manufacturing operation engaged primarily in the processing of alloy and stainless steel. In March, 1974, Ohio received approval from EPA under section 402(b) to begin issuing NPDES permits, and Republic immediately commenced to negotiate with the Ohio Environmental Protection Agency (Ohio EPA).

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[4] This deadline is not expressly mandated by the Act, but may be inferred from the fact that 33 U.S.C. § 1342(k) states that continuation of effluent discharge without a permit after December 31, 1974 will violate the Act unless a permit application is pending and disposition has been delayed for reasons other than the discharger's own negligence. *See Natural Resources Defense Council, Inc.* v. *Train*, 510 F.2d 692, 707 (D.C. Cir. 1975).

In June, 1974, Ohio EPA issued a draft permit[7] for the Canton mill which incorporated *state defined* effluent limitations under state estimates of BPT. The permit provided for a 24 month compliance schedule compatible with the Act's July 1, 1977 interim implementation deadline. At that time EPA had failed to promulgate any section 304(b) effluent limitation guidelines for iron and steel manufacturing.[8] As of the present date no final regulations exist covering alloy and stainless steel operation.[9]

Understandably, in the absence of controlling federal regulations, Republic sought to exploit available state administrative procedures to secure the most favorable permit terms and conditions. Prolonged hearings and negotiations with Ohio EPA resulted in redefinition of the originally proposed effluent limitations. On August 1, 1975, eight months after the last date envisioned by Congress for routine issuance of NPDES permits, final agreement was reached and the implementation period commenced to run. However,

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[7] NPDES permit No. D 300*AD.

[8] Regulations defining BPT effluent limitations for primary operations in carbon steel manufacturing were promulgated in 39 *Fed. Reg.* 24114 (June 28, 1974). However, these regulations were subsequently remanded in their entirety to the Administrator for revision in accordance with the decision in *American Iron and Steel Institute* v. *EPA*, 526 F.2d 1027 (3rd Cir. 1975). As of the date of oral argument in the instant case, no revised regulations had been promulgated.

[9] "Interim final" guidelines covering alloy and stainless steel operations were published in 41 *Fed. Reg.* 12990 (March 29, 1976).

Republic continued to assert that full compliance within 24 months was physically impossible.[10] This prompted further adjudication hearings at which Republic presented unchallenged engineering and procurement data which convinced Ohio EPA to modify the permit to allow 42 months for development and installation of antipollution devices. Ohio EPA was aware that this change extended compliance beyond the July 1, 1977, date imposed by section 301(b)(1)(A)(i). However, the state administrator believed that the special circumstances of the case legally justified this deviation.

In January, 1976, Ohio EPA transmitted the final NPDES permit to EPA's Region V office as required by section 402 (d)(1). Within 90 days the Director of the Enforcement Division of Region V objected to its issuance, exercising his authority under section 402(d)(2)(B). He did not expressly question the reasonableness of the state's BPT effluent standards or the 42 month implementation schedule. Rather, he concluded that the permit violated section 301 because full compliance would not be achieved until after July 1, 1977. Republic filed a timely petition for judicial review, pursuant to section 509(b)(1)(F),[11] challenging this determination.

We do not question EPA's good faith in attempting to discharge the ambitious and often ambiguous du-

[10] Had Republic's permit been issued before the statutory deadline mandated by 33 U.S.C. § 1342(k), the company would have had 30 months to achieve BPT effluent levels.

[11] 33 U.S.C. § 1369(b)(1)(F).

ties imposed upon it by a "poorly drafted and astonishingly imprecise statute." *E.I. du Pont de Nemours & Company* v. *Train*, 541 F.2d 1018, 1026 (4th Cir. 1976). Many factors, some admittedly beyond EPA's control, have conspired to frustrate its legitimate compliance efforts. In particular, virtually every exercise of the agency's discretion has precipitated protracted litigation challenging the legitimacy of its authority or the substance of its "final" regulations. *See American Petroleum Institute* v. *Environmental Protection Agency*, 540 F.2d 1023, 1027 (10th Cir. 1976) (thirteen relevant cases cited).

The fact remains, however, that the imperative nature of EPA's rule making responsibilities under the Act has been confirmed through litigation. In 1975, the United States Court of Appeals for the District of Columbia affirmed the authority of a federal district court to compel the agency to adhere to a remedial court imposed timetable for the publication of guidelines for all point source effluent discharges. *Natural Resources Defense Council, Inc.* v. *Train*, 510 F.2d 692 (D.C. Cir. 1975). Unfortunately, judicial intervention did not avert the regrettable situation which confronts us here. The inability of EPA to meet its statutory obligations has distorted the regulatory scheme and imposed additional burdens which must be equitably distributed. This task is a difficult one because of the nature of the available options. Either the affected discharger must be compelled to risk potential enforcement proceedings in spite of an abbreviated compliance schedule, or so-

ciety must tolerate slippage of an interim pollution abatement deadline.

Republic contends that the language of section 301 (b)(1)(A)(i) expressly conditions adherence to the July 1, 1977, deadline upon definition *by the Administrator* of BPT effluent limitations and guidelines *pursuant to section 304(b) of the Act.* Therefore, the Administrator's failure to satisfy this condition precedent by publishing final regulations for alloy and stainless steel manufacturing excuses Republic's noncompliance with the July 1 date. We reluctantly agree. The import of the section is unequivocal: federal regulations must exist before dischargers can be compelled to honor dates for implementing them. *See United States* v. *GAF Corporation*, 389 F. Supp. 1379, 1386 (S.D. Tex. 1975). The presence within the Act of successive deadlines for promulgation of standards, issuance of permits, and conformance with effluent limitations bespeaks a rational implementation strategy anticipating a discrete sequence of events:

> The Act's text and its legislative history make clear that as a general matter the section 304 (b)(1) guidelines and the section 301(b)(1) limitations were to be developed prior to the issuance of permits. Sections 402(a) and 402(b) require that permits issued by the Administrator and by the states assure compliance with the effluent limitations of section 301. The Senate Report confirms the interdependence of the three provisions. That report states that "[s]ubsection (b) of this section [304] requires the Administrator, within one year after enactment, to publish guidelines for setting effluent limitations reflecting the mandate of section 301, which will be imposed as conditions of permits issued under section 402." Another portion of the Senate Report indicates that at least 30 months lead time is required to afford industries an opportunity to complete construction and modifications necessary to comply with the phase one effluent limitation deadline. Under the final version of the Act, effluent limitations and permits would be required by December 31, 1974, in order to provide polluters 30 months to comply with the July 1, 1977, deadline.

Natural Resources Defense Council, Inc. v. *Train*, 510 F.2d 692, 707-708 (D.C. Cir. 1975) (footnotes omitted).

The crucial role of federal rule making in achieving meaningful pollution control on a national scale is revealed by the Third Circuit's analysis in *American Iron and Steel Institute* v. *EPA*:

> [W]e reconcile sections 301 and 304 in the following manner: the section 301 limitations represent both the base level or minimum degree of effluent *control* permissible and the ceiling (or maximum amount of effluent discharge) permissible nationwide within a given category, and the section 304 guidelines are intended to provide precise guidance to the permit-issuing authorities in establishing a permissible level of discharge that is *more stringent than the ceiling.*

526 F.2d 1027, 1045 (3d Cir. 1975). (emphasis added). If no federal standards exist, *any* state limita-

tions on discharge, no matter how insignificant, become more stringent than nonexistent ceilings imposed by the Act. *See* section 301(b)(1)(C). Surely Congress did not intend for the Act to be construed to foster token, *ad hoc*, clean up efforts which would inevitably defeat achievement of the goal of zero pollution by 1985.[12]

EPA answers Republic's argument by exhorting us to accept the "plain meaning" of section 301(b)(1)(A). The agency contends that the language of the section admits to no other interpretation than that July 1, 1977 is to be a "uniform deadline on all industrial discharges, * * * plain, unequivocal and mandatory." Unfortunately, EPA's argument is persuasive only if we accept an expurgated version of the section which omits reference to the duty owed by the Administrator to publish regulations by a fixed date.

EPA correctly points out that the Act is devoid of language countenancing exceptions to the July 1, 1977, deadline under any condition. The Act's legislative history is replete with statements attesting to the inflexible nature of the administrative timetable.[13] In addition, Congress rejected a provision in the House version of the measure which would have allowed dischargers a discretionary extension of time in the face of impending noncompliance due to physical or legal impossibility.[14] Nevertheless, nothing cited to us by EPA suggests that Congress anticipated the "Catch 22" situation inherent in the facts of this case. The language of the Act and its legislative history make clear that Congress expected EPA to define the rules before subjecting dischargers to potential civil and criminal penalties. *Natural Resources Defense Council, Inc.* v. *Train, supra.*

[12] The Director of Ohio EPA, a respondent in the case whose position is aligned with that of Republic, argues that he issued Republic's NPDES permit under the authority of 33 U.S.C. § 1311(b)(1)(C) which allows states to impose more stringent limitations than those applicable under the Act. If we follow this strained rationale, we would have to approve any state permit which authorized dischargers to maintain current effluent levels because *any* standard is more stringent than a nonexistent federal ceiling. This we refuse to do because it would be inimical to achieving meaningful pollution abatement on a national scale.

EPA attempts to bolster its position by emphasizing its authority under section 402(a)(1), in advance of formally promulgated regulations, to issue and enforce NPDES permits imposing "such conditions as the Administrator determines are necessary to carry out the provisions of the Act." *Id.* From this, it would have us conclude that the duty of the discharger to achieve BPT by July 1, 1977, must be independent of EPA's obligation to promulgate the necessary guidelines by October 18, 1973. EPA cites *Bethlehem Steel Corporation* v. *Train*, 544 F.2d 657

[13] For a comprehensive review of this legislative history, see *Bethlehem Steel Corporation* v. *Train*, 544 F.2d 657, 661-662 (3rd Cir. 1976).

[14] See proposed section 301(b)(3), *A Legislative History of the Water Pollution Control Act Amendments of 1972*, 93rd Cong. 965 (Jan. 1973).

(3rd Cir. 1976), and *United States* v. *Cutter Laboratories, Inc.*, 413 F. Supp. 1295 (E.D. Tenn. 1976), in support of this position.[15]

A careful reading of both opinions confirms that EPA's reliance upon them is misplaced. The Third Circuit correctly categorizes EPA's authority under section 402(a)(1) to issue NPDES permits on a case by case basis as a *temporary* expedient to ensure immediate progress during the year of rule making contemplated by section 402(b):

> As a result [of the nonexistence of section 304 and 301 guidelines and limitations for iron and steel manufacturing as of the date of the opinion], permits have been issued to iron and steel manufacturers under a clause of section 402(a)(1) that empowers the EPA to grant permits, *on an interim basis*, before formal guidelines are promulgated.

Bethlehem Steel Corporation v. *Train*, 544 F.2d at 659 (emphasis added). In the *Bethlehem Steel* case EPA granted the permit on December 31, 1974, the last day mandated by Congress for routine issuance of NPDES permits. Therefore, Bethlehem Steel en-

[15] EPA also draws our attention to *State Water Control Board* v. *Train*, 8 E.R.C. 1609 (E.D. Va., 1976) which upheld the inflexibility of a different section 301 deadline where noncompliance was due to the failure of Congress to appropriate sufficient money for public works (in this case, the construction of municipal sewage treatment plants). This case is readily distinguished from the present situation where noncompliance is linked to derelection by EPA of duties imposed by the Act itself as a condition precedent to compliance.

joyed a 30 month compliance schedule, the minimum period possible under the statutory scheme assuming no administrative slippage. In contrast, Republic's permit was issued by a state agency eight months after expiration of the permit granting deadline, affording Republic only 24 months for compliance. This factual difference was not overlooked by the Third Circuit which carefully excludes Republic's situation from the purview of its holding in the *Bethlehem Steel* case.[16]

We read the *Bethlehem Steel* and *Cutter Laboratory* decisions as standing for the limited proposition that a July 1, 1977, deadline, written into an NPDES permit *issued by EPA on or before December 31, 1974*, is enforceable despite the absence of BPT federal guidelines. Although we may share this view, we find no pursuasive authority for extending its application to permits issued by EPA after 1974.[17] In addition, we are convinced that the Act expressly forecloses this result when the permit issuing au-

[16] *See* 544 F.2d at 660 n. 20. Republic appeared as *amicus curiae* in that case on behalf of Bethlehem Steel. *United States Steel Corporation* v. *Train*, Nos. 76-1425 and 76-1616 (7th Cir. May 13, 1977), a case in which EPA issued the NPDES permit in October, 1974, while federal BPT standards existed for iron and carbon steel manufacturing, is distinguishable from our decision here on the same ground.

[17] The difficulty is dramatized by a hypothetical case in which EPA issues an NPDES permit in 1977 requiring compliance with the July 1, 1977 completion date. Under such circumstances compliance may well be foreclosed by constitutional objections. *See United States Steel Corporation* v. *Train*, Nos. 76-1425 and 76-1616, at 51 (7th Cir. May 13, 1977).

thority is a state agency. Section 402(1)(A) empowers states to issue NPDES permits which "apply, and insure compliance with, any applicable requirements of sections 301, * * * of [the Act]." *Id.* Our holding that section 301(b)(1)(A)(i) is made unenforceable by the Administrator's failure to promulgate necessary regulations is tantamount to a finding that the July 1, 1977, deadline is no longer an "applicable requirement" of the Act. Therefore, in this case, Ohio EPA was not bound to apply it and EPA was without authority to object to the proposed permit on this ground.[18]

EPA's final contention is that it complied with the rule making requirements of section 304(h) by implicitly ratifying the effluent limitations defined by Ohio EPA. EPA ignores the actual language of section 301(b)(1)(A)(i) which demands that BPT guidelines be promulgated pursuant to the procedure set forth in section 304(b). Ohio EPA did not follow that procedure for the obvious reason that section 304(b) is exclusively addressed to the Administrator of EPA. We reject the notion that state acts can be federalized *sub silentio* by the mere acquiescence of an administrative agency in the absence of clear statutory provisions to that effect.

Republic urges us to remand the case to EPA with directions that the agency unconditionally approve immediate issuance of Republic's NPDES permit in

[18] We expressly exclude from our holding situations in which state agencies may have issued NPDES permits in the absence of federal guidelines prior to December 31, 1974.

its original form. However, the record suggests a more appropriate remedy. If we assume that the Administrator satisfactorily performed all the tasks incumbent upon him under sections 301 and 304, Republic could not have received its permit any earlier than September 1, 1974.[19] This would have afforded no more than 34 months to achieve final BPT effluent limitations. The actual permit provides 42 months, eight more than Republic would have been entitled to had there been no distortion of the Act's timetable. Our disposition of this case is intended to relieve the discharger of the unfair consequences flowing from EPA's administrative shortcomings. It is not intended to bestow special benefits not enjoyed by other permittees.

EPA is not foreclosed from objecting to Republic's permit on grounds other than the termination date of its compliance schedule. Under the special circumstances of this case, we believe that EPA must be granted a second opportunity to scrutinize the balance of the permit for consistency with the Act.[20] Perhaps the inherent reasonableness of the proposed 42 month period is amenable to administrative review under existing regulations or sections other

[19] This date approximately reflects the date upon which Republic's permit was first issued by Ohio EPA (prior to extensive renegotiations and modification of terms) plus the maximum period reserved for the filing of objections by EPA.

[20] The obviousness of the permit's putative section 301 violation may have prompted EPA to bypass an exhaustive review of its other substantive provisions.

than 301. That is for EPA to determine in the first instance.

To guard against the possibility that situations such as this will prompt state agencies to propose extravagant compliance schedules, we remand the case to EPA with directions that the agency acquiesce to issuance by Ohio EPA of Republic's NPDES permit unless, within 30 days, it specifies persuasive new grounds for objection under section 402(d)(2)(B).

Remanded.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 76-1557

[Filed Jun. 23, 1977, John P. Hehman, Clerk]

REPUBLIC STEEL CORPORATION, PETITIONER

v.

RUSSELL E. TRAIN, Administrator, United States Environmental Protection Agency,

GEORGE R. ALEXANDER, JR., Regional Administrator, United States Environmental Protection Agency,

and

NED E. WILLIAMS, Director, Ohio Environmental Protection Agency, RESPONDENTS

Before: CELEBREZZE and LIVELY, Circuit Judges, and RUBIN, District Judge.

On petition to review an action of the Administrator of the United States Environmental Protection Agency,

This cause came on to be heard on the brief and record of proceedings before the Environmental Protection Agency and was argued by counsel.

On consideration whereof, it is now ordered, adjudged and decreed by this Court that the case be and

it is hereby remanded to the Environment Protection Agency with directions.

Each party will bear its own costs on this appeal.

ENTERED BY ORDER OF THE COURT.

/s/ John P. Hehman
Clerk

APPENDIX C

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

REGION V

230 South Dearborn St.
Chicago, Illinois 60604
Mar. 30, 1976

Mr. Ned Williams, Director
Ohio Environmental Protection Agency
P.O. Box 1049
Columbus, Ohio 43216

RE: Republic Steel Corporation
Canton, Ohio Facility
OEPA Permit No. D 300*AD

Dear Mr. Williams:

On January 5, 1976, the Ohio Environmental Protection Agency (OEPA) submitted for United States Environmental Protection Agency (USEPA) consideration pursuant to § 402(d) of the Federal Water Pollution Control Act, as amended, (FWPCA) and the OEPA-USEPA Memorandum of Agreement, a stipulation and proposed permit for the referenced facility. The transmittal letter noted that the schedule of compliance for BPT effluent limitations in this permit extended beyond July 1, 1977. A 45-day period was specified for this Agency's response. Subsequently, the response time was extended to April 1, 1976, by mutual agreement of our respective agencies.

Because of the legal and policy implications involved in extending the statutory requirement for achievement of BPT by July 1, 1977, (Section 301 of the FWPCA), Region V asked USEPA Headquarters for review and comment. The recommendation of the Deputy Assistant Administrator for Water Enforcement is attached to this letter.

We have also engaged in numerous extended discussions of this permit and the problems it poses, most recently a conference call on March 29, 1976, among Region V staff, a representative of the Ohio Attorney-General; and counsel and others for Republic Steel Corporation.

Based on the record presented, the transcript of proceedings, the proposed NPDES permit, and the Stipulation of the parties, Region V, USEPA, hereby makes the following findings:

1. Permit No. D 300*AD was issued to Republic Steel Corporation for its Canton, Ohio facility on June 10, 1974. Final effluent guidelines for the Iron & Steel Industry had not been promulgated as of the date of permit issuance.
2. The final effluent limitations specified in the proposed permit represent BPT as stipulated by the OEPA and Republic in the absence of promulgated guidelines. By letter of February 24, 1976 from A. H. Manzardo to Ned Williams, Region V concurred in the appropriateness of the final limitations.

3. An adjudicatory hearing was held to consider the Schedule of Compliance for achieving the final limitations specified in the permit.
4. As a result of said hearing, it was stipulated by the parties (OEPA and Republic Steel) that the Schedule of Compliance specified in the proposed permit is reasonable for achieving the final limitations in the permit.
5. The reasonableness of the Schedule of Compliance is not questioned by USEPA.
6. The FWPCA mandates compliance with BPT no later than July 1, 1977.
7. The Schedule of Compliance runs for 41 months and would result in achievement of BPT subsequent to July 1, 1977.
8. The Administrator of the USEPA, in NPDES Appeal No. 75-9, Bethlehem Steel Corporation, dated September 30, 1975, and the USEPA General Counsel in Decision No. 26, Bethlehem Steel Corporation, dated July 24, 1975 have held that compliance with BPT limitations must be achieved no later than July 1, 1977.

Based upon the foregoing findings, Region V, USEPA, has determined that the stipulation and proposed permit for Republic Steel Corporation, Canton, Ohio facility, would violate Section 301 of the FWPCA in that the Schedule of Compliance for BPT extends beyond July 1, 1977, and for that reason, Region V, USEPA, objects to the issuance of said permit. If the proposed permit can be revised to conform with the

requirements of the FWPCA, this objection will be withdrawn.

Very truly yours,

/s/ James O. McDonald
JAMES O. MCDONALD
Director
Enforcement Division

Attachment

cc: Mr. John Daniel
Office of the Attorney General
State of Ohio

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

Feb. 25, 1976

OFFICE OF ENFORCEMENT

MEMORANDUM

TO: Director, Enforcement Division, Region V

FROM: Deputy Assistant Administrator for Water Enforcement

SUBJECT: Republic Steel Corporation, Canton, Ohio Stipulation and Proposed NPDES Permit

This is in response to your letter of January 22, 1976, regarding the Ohio EPA proceedings on the above-identified permit.

We have reviewed the Ohio EPA letter to your office dated January 5, 1976, the "Stipulation" between the State of Ohio and Republic Steel bearing a filing date of January 2, 1976, the proposed OEPA permit, No. D 300 *AD, bearing a filing date of January 2, 1976, and the transcript of proceedings in the Ohio adjudicatory hearing.

In our opinion, U.S. EPA must object to the schedule of compliance in the proposed Ohio permit on the ground that it is outside the requirements of section 301 of the Federal Water Pollution Control Act.

/s/ Jeffrey G. Miller
JEFFREY G. MILLER

APPENDIX D

1. Section 301 of the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 844, 33 U.S.C. 1311, provides in relevant part:

> (a) Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.
>
> (b) In order to carry out the objective of this chapter there shall be achieved—
>
> (1)(A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 1314(b) of this title, or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 1317 of this title; * * *
>
> * * * * *
>
> (2)(A) not later than July 1, 1983, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of

> eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 1325 of this title), that such elimination is technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, or (ii) in the case of the introduction of a pollutant into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, shall require compliance with any applicable pretreatment requirements and any other requirement under section 1317 of this title; and
>
> (B) not later than July 1, 1983, compliance by all publicly owned treatment works with the requirements set forth in section 1281(g)(2)(A) of this title.
>
> * * * * *

2. Section 304 of the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 850, 33 U.S.C. 1314, provides in relevant part:

> * * * * *
>
> (b) For the purpose of adopting or revising effluent limitations under this chapter the Administrator shall, after consultation with ap-

propriate Federal and State agencies and other interested persons, published within one year of October 18, 1972, regulations, providing guidelines for effluent limitations and, at least annually thereafter, revise, if appropriate, such regulations. Such regulations shall—

(1) (A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best practicable control technology currently available for classes and categories of point sources (other than publicly owned treatment works); and

(B) specify factors to be taken into account in determining the control measures and practices to be applicable to point sources (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best practicable control technology currently available to comply with subsection (b)(1) of section 1311 of this title shall include consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application, and shall also take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate;

(2)(A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best control measures and practices achievable including treatment techniques, process and procedure innovations, operating methods, and other alternatives for classes and categories of point sources (other than publicly owned treatment works); and

(B) specify factors to be taken into account in determining the best measures and practices available to comply with subsection (b)(2) of section 1311 of this title to be applicable to any point source (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best available technology shall take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, the cost of achieving such effluent reduction, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate; and

(3) identify control measures and practices available to eliminate the discharge of pollutants from categories and classes of point sources, taking into account the cost of achieving such elimination of the discharge of pollutants.

* * * * *

3. Section 402 of the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 880, 33 U.S.C. 1342, provides in relevant part:

> (a)(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.
>
> (2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraphs (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.
>
> (3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.
>
> * * * * *
>
> (5) * * * The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this chapter, to issue

> permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(h)(2) of this title, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this chapter. No such permit shall issue if the Administrator objects to such issuance.
>
> (b) At any time after the promulgation of the guidelines required by subsection (h)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide ade-

quate authority to carry out the described program. * * *

* * * * *

(d) (1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b) (5) of this section objects in writing to the issuance of such permit, or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this chapter.

(3) The Administrator may, as to any permit application, waive paragraph (2) of this subsection.

* * * * *

(k) Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317, and 1343 of this title, except any standard imposed under section 1317 of this title for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 1311, 1316, or 1342 of this title, or (2) section 407 of this

title, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. For the 180-day period beginning on October 18, 1972, in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date of enactment which source is not subject to section 407 of this title, the discharge by such source shall not be a violation of this chapter if such a source applies for a permit for discharge pursuant to this section within such 180-day period.

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